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**Supreme Court of the United States**

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October Term, 1977

No. 77-1161

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ALBERT C. DREBIN, BUDGET FILMS, INC., and LAW-  
RENCE S. FINE,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITIONERS' REPLY BRIEF.**

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## PETITIONERS' REPLY BRIEF.

Petitioners herein hereby reply to the Government's Brief under Rule 24(4) of the U.S. Supreme Court Rules, as follows:

### 1. The Issue of "Willfulness."

The Government contends that Petitioners failed to challenge the sufficiency of evidence regarding "Willfulness" on appeal. (Respondent's Brief "R.B." 7.) While it may be true that no enumerated issue was specifically identified as "Willfulness" in their Briefs, that issue was the overriding theme in their entire defense.

The "Willfulness" issue in a criminal copyright infringement by VENDING case, must be viewed in a light entirely differently from that of any other kind of criminal matter. In the usual criminal case, it is the conduct of the defendant which is subject to the

"Willfulness" consideration. Here, the conduct of Petitioners was the vending of motion picture film prints. Petitioners would not suggest that they did not "Willfully" vend prints of films. But this is not the kind of "Willfulness" which must be proved for conviction of that crime. In fact, the "Willful" vending of film prints is NOT a crime at all unless two other elements are proved by the Government: 1, That the particular prints with which the defendant is charged had never before been FIRST SOLD, and 2, That the defendant KNEW that the prints which he sold had never before been FIRST SOLD. 17 U.S.C. §27; *United States v. Atherton*, 561 F.2d 747, 750. The only effort that the Government made to "prove" either of these two elements was in its orchestration of testimony by film studio executives that "film prints are never sold, but only licensed." The *Atherton* court rejected this contention and analyzed the so-called "licenses," finding many of them in actuality, nothing but SALES. (At pp. 750, 751.)

No evidence at all, of any kind or nature, was offered by the Government to prove the "*scienter*" element which the *Atherton* court found necessary to convict. Aside from the rhetoric that "prints are never sold," there was nothing to even indicate that Petitioners KNEW that any of the prints with which they were charged had not been previously "first sold." As ruled in *Atherton*, it is not necessary to find an "outright sale," to establish that "first sales" had been made. (At 750.)

The trial court improperly instructed the jury on the crucial issue of the "First Sale Doctrine" thereby creating the erroneous impression upon the jury that the COPYRIGHT ITSELF, as well as the property

in the film prints, needed to be passed in a "First Sale."

"Now, the clause in that statute—and I quote—'the possession of which has been lawfully obtained' as used in that statute means that *title* and *ownership* has passed to the one who has obtained possession lawfully." (R.T. 4468.)

This unduly restrictive interpretation of the relevant statute not only denied Petitioners the broader statutory construction to which they were entitled under criminal laws, but impliedly refuted the application of the kinds of transactions described in *Atherton* held by that court to be "First Sales." Thus, such esoteric language as was found in certain contracts between the film studios and television networks and held by the Court of Appeals in this case, as well as in *Atherton*, to constitute "First Sales," and the other transactions, such as salvage sales and "V.I.P. licenses," etc., would not have occurred to the jury to satisfy the "First Sale" concept. These errors, plus the basic failure of the Government to offer any proof of the source of any of the prints charged to Petitioners, and merely to rely upon the precept that "films are never sold," all serve to automate the "Willfulness" defense.

Although Judge Hufstедler, in *Atherton*, distinguished between the terms, "Willfulness," and "*scienter*," that same distinction would apply here:

"The Government adequately proved infringement, willfulness, and profit, but it failed to negate first sale or to prove *Atherton's scienter*." (At 749.)

Even in the instance of one of the counts in *Atherton* in which the Government successfully proved the ab-



sence of a "First Sale," that Court still ordered that count reversed on ground that "scienter," or Atherton's knowledge of the absence of a "First Sale", had not been proved.

"The testimony was uncontroverted that 'THE EXORCIST,' at the time Atherton sold a copy of that print, had not been the subject of any television contracts, V.I.P. contracts, armed services contracts or airline contracts, and that no prints of the film had been sent to salvage companies. 'THE EXORCIST' copyright count must nevertheless be reversed because *the Government failed to prove that Atherton knew that no print of 'THE EXORCIST' had been subject to first sale.*" (At 752.) (Emphasis ours.)

Hence, it may be seen that the terms "Willfulness," and "scienter" and "knowledge," and other such terms, are so intertwined with the intricate and diverse interpretations of the "First Sale Doctrine," there can be no realistic contention that the absence of a formalized assignment of a term, such as "Willfulness," will deprive Petitioners of a full review of this entire package of elements.

That Petitioners' "Willfulness" should be subject to review is emphasized in the fact that three counts were ultimately reversed in this case after discovery by the Court of Appeals of three film studio-television network contracts containing the same esoteric language as referred to in both *Atherton* and *United States v. Wise*, 550 F.2d 1180, cert. den., Oct. 31, 1977 (No. 77-5457). Surely, the presence or absence of such language, or even those very contracts themselves, could not have been known to Petitioners at the time

of their sales of the film prints. It is the height of serendipity to hold Petitioners at their peril to know of the existence or lack thereof of such contracts and such language.

## 2. The "Harmless Error" Finding.

The Solicitor General misperceives the import of the requirement that a defendant "must go forward with specific evidence demonstrating taint," before the government is required to meet its burden of persuasion. *Alderman v. United States*, 394 U.S. 165, 183. In the *Alderman* case, the fact of the illegal search was not even known to those defendants until after the matter was presented for review to this Court. It is therefore not Petitioners' responsibility to establish the possibilities of taint prior to appeal, or even prior to submitting the cause to this Court for review. The requirement is simply that the defendant present such evidence at the adversary hearing before the Government needs to meet the burden. The failure of Petitioners to identify the source of all evidence which might be violative of their rights at this stage of the proceedings does not affect their rights to an ultimate determination of taint or lack of taint. Since the source of the Government's evidence is not made available to defendants at any time, unless under court order in such an adversary hearing, it would be an exercise in futility to require that defendants produce evidence of the taint of such sources prior thereto.

In this case, even more than in *Alderman*, there is more than sufficient evidence of the probability of taint as to much of the evidence used. Here, evidence WAS in fact used which was obtained in the illegal search and seizure. Petitioners have a right under such

circumstances to ascertain which, if any, other items of evidence may have been adduced as a result of leads found by the Government during its illegal search of the premises of BUDGET FILMS, INC.

### **3. Film Salvage Company Sales.**

The Government now belatedly complains that the *Atherton* decision applied the "First Sale Doctrine in a manner unduly favorable to copyright infringement defendants." (R.B. 13, footnote 12.) Although the Government requested, and was granted, additional time for the preparation of its Petition to contest the *Atherton* decision in this Court, it failed to do so. Now, it seeks to make its point behind a gratuitous commentary.

#### **The Government Shares the Misapprehension of the Court of Appeals as to the Significance of the Proof of Sales to Salvage Companies.**

The reference by the Government to the rationale of the Court regarding its rejection of the purchase by a defense witness of prints of the film "DILLINGER," evidences that it shares in the Court's misunderstanding of the point. The "failure" of that purchase to dispel "the evidence sufficient to prove that appellants did not obtain from salvage the films which they are charged with infringing," (557 F.2d 1316, 1327) was totally irrelevant. Petitioners were certainly not required to prove either the absence of first sales or the source of the prints which they sold. All that was intended to be proved by that purchase was the fact that a) sales are made of prints to salvage companies and b) that salvage companies do in fact sell complete prints of films. Such proof should have been

sufficient, not to prove that Petitioners obtained their prints from salvage companies, but that a general policy statement that "films are never sold" is not enough to establish the absence of "First Sales," and that the Government bore the burden of tracing the prints which it claims had never before been "first sold."

#### **No Evidence That Any Salvage Company Sold a Print of Any of the Six Prints Named in the Copyright Infringement Counts.**

The Government points to the failure of Petitioners to bring evidence that the salvage companies ever sold prints of any of the six films charged in the Indictment. (R.B. 13.) This is the latest in the attempts by the Government to switch the burden of proof to defendants in this criminal case. Considering the obvious difficulties with which the Petitioners had to contend in obtaining evidence of what the studios or their salvage companies do, or do not do, it is surprising that a sale of even one film print was effected. But that print title, coincidentally being one of those charged to Petitioners as an "Overt Act," is indeed startling.

### **4. Misconduct of a Government Officer Emphasizes the Harmfulness of the Error.**

The Government astonishingly avoided coming to grips with the cited blatant perjurious statements of one of the investigating F.B.I. officers. This issue deserves the most thorough and in-depth treatment. (C.T. 310; R.T. 991-98, 1973-75, 2017-18; Exh. AB, p. 12.)

**5. Significant and Recurring Problems Concerning the Use of "Harmless Error" in Such Illegal Searches and Seizures as Present in This Case.**

The Government also saw fit to ignore the fact that the very verbiage contained in the Warrant which was deemed in this case to be illegal, was contained in at least one Warrant used by the Government as late as this very year, 1978.

The deterrent effect which is doubtlessly intended in the Court's ruling on the illegality of the search and seizure in this case, had so little effect that the Government did not even make the slight attempt at altering the composition of words on the face of its Warrants. It is a travesty that on one hand, the Court makes a ruling that the error in the use of such a Warrant is "harmless," and on the other, the Government obviously utilizes such a ruling to continue in the nefarious practice of using the illegal content, knowing that its cases will stand up under the ruling of "harmless error." (See Appendix 3, Petitioners' Brief.)

**Conclusion.**

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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